FRONT LINE Report

April 2007 OFFICE OF MISSOURI ATTORNEY GENERAL Vol. 14, No. 1

AGO, officers protecting consumers

This issue of Front Line Report focuses on consumer protection, and how the Attorney General's Office can and does work with law enforcement agencies around the state on these issues.

Nixon files suits in price gouging cases

After the catastrophic ice storm that pounded southwest Missouri in January, consumers filed more than 400 complaints about price gouging. Products included gasoline, kerosene, hotel rooms and generators. On Feb. 15, Attorney General Jay Nixon announced settlements and lawsuits involving eight companies, with 40 more still under investigation.

Children's hospital benefits from badge fraud bust

An O'Fallon fundraiser who solicited money by falsely claiming he was a policeman will pay more than $55,000 in restitution and donations to a children's hospital.

Gerald J. Lami, who raised money under the name Police Tribune, will return money to his contributors and has donated $5,000 to Ranken Jordan Hospital in Maryland Heights.

Nixon's office got a temporary restraining order in 2005 to freeze the assets of Lami and his son Jay Lami.

Kwan, a 10-year-old patient, thanks Nixon and St. Louis-area police officers for a $5,000 donation to Ranken Jordan Hospital. The departments were instrumental in providing information to the AG's Office on a fraud case from which the money was obtained.

Action taken against 11 home repair businesses

Nixon, often in conjunction with local prosecutors, brought 11 civil and criminal cases against home repair companies in 2006. Nine were in the St. Louis area. Among the cases:

- Jason M. Leavy of St. Louis County was sentenced to four years in prison.
- Nixon accused James Jordan of preying on military families near Fort Leonard Wood. Nixon obtained a TRO against Jordan's company, saying he collected thousands of dollars for repairs, and then did little or no work.

2006 Top 10 complaints, inquiries

1. Finance, credit, bill collectors: 4,630
2. Charitable solicitations: 2,021
3. Auto sales, repair: 1,939
4. Online services, auctions: 1,791
5. Telephone slamming, cramming, billing: 1,382
6. Home repair, remodeling: 1,327
7. Lotteries, sweepstakes: 1,290
8. Insurance: 1,157
9. Identity theft: 1,149
10. Publications, magazines: 1,079

Resources available for consumer presentations

The AGO has several materials available to help officers make presentations. They include publications on issues such as consumer rights, home repair fraud, ID theft and landlord-tenant law; PowerPoint presentations; and fliers.

Contact Dawn Overbey at 573-751-8844 or dawn.overbey@ago.mo.gov. Publications also may be ordered at ago.mo.gov.

Send complaints to AG's Office

Agencies are encouraged to direct consumers to the AG's Office to file a complaint about a business or individual.

Most cases handled by the office involve unfair practices in the sale of goods or services. Nixon returned over $10 million to consumers in restitution in 2006.

FILE A COMPLAINT

Submit a form at **ago.mo.gov** or call the Consumer Protection Hotline at **800-392-8222.**

Personnel records not automatically closed

A Feb. 20 decision by the Missouri Court of Appeals establishes that "individually identifiable personnel records" are not automatically closed. Instead, every law enforcement agency must enact a regulation, policy or rule explicitly closing those records.

In *State ex rel Missouri State Board of Pharmacy v. AHC*, the court noted that Section 610.021 allows a governmental agency to close personnel records, but does not require any agency to do so. There is no prohibition on any agency from opening officers' personnel files to the public. There are many policy considerations — including officer safety — that reinforce the practice of most agencies to close these records.

State ex rel Board of Pharmacy v. AHC
No. 66401, Mo.App., W.D.
Feb. 20, 2007

Know the law: Order a free copy of the Sunshine Law at ago.mo.gov.

If an agency wants to close these records, it must take affirmative steps. This requires issuing a policy or regulation that these records are closed.

Since the Board of Pharmacy had never issued any rule or regulation, it could not argue that its personnel records were closed. The board had to turn over an investigator's personnel records to a litigant.

While the AG's Office has been a consistent advocate for open government and a broad interpretation of the Sunshine Law, it also recognizes the unique nature of law enforcement, and the risks to officers.

While it is not unreasonable for an agency to lawfully close personnel files, it first must take steps to do so.

Contact prosecutor about seized-property disposal

Seized property should not be returned, released or destroyed without court order

The AG's Office wants to clear up confusion over how a law enforcement agency disposes of evidence or other property. More troubling is the practice of some agencies appropriating property for departmental use, or worse, personal use.

Generally, when an agency seizes property — regardless of circumstances —the agency is seizing it on behalf of the courts. That is true for evidence, recovered or abandoned property, or contraband. Agencies and officers should not decide who should get the property, or when. That is a decision for the court.

Therefore, once property is seized, it should not be returned, released or destroyed without a court order.

Section 542.301, RSMo sets out the procedure for disposing of seized property. It does seem to allow an agency to return property to its true owner without a court order.

But who is the true owner? It is better for the court to decide rather than the agency. There have been several lawsuits where agencies have released property, only to have another person claim ownership.

When property needs to be returned, released or destroyed, the Attorney General's Office recommends that the agency contact its county prosecutor, who can seek a court order. This not only protects an agency from liability, but the property more likely will be disposed of properly.

Agencies cannot "keep" the property for use. In enacting the CAFA provisions, the legislature made it clear that agencies should not benefit from seized items. While a seized weapon or vehicle might be valuable in enforcing the law, there are few circumstances where this will be permitted.

Property that is of no use to anyone else, or which is subject to forfeiture, must be sold at a sheriff's auction and the proceeds given to the schools or county treasury.

The AG's Office legally has been required to prosecute several criminal and civil cases against officers who have violated these rules. By knowing the law, the AG's Office hopes to prevent future legal actions.

Also, there have been a few cases where lack of communication between law enforcement and prosecutors resulted in evidence being destroyed prematurely and jeopardizing a criminal case. This is one more reason why an agency should consult with the prosecutor.

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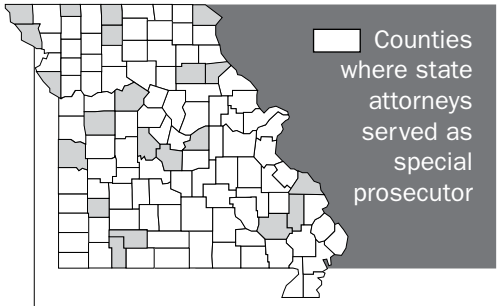
AG's Office assists local prosecutors

The Attorney General's Public Safety Division handled 794 special prosecutions in 94 of Missouri's counties and the city of St. Louis in 2006. Division attorneys assist local prosecutors in complicated trials or are appointed as special prosecutors when there is a conflict of interest. This legal work saved counties about $3.2 million. Among the cases:



- A former clerk in the Pulaski County Public Administrator's Office pleaded guilty to 28 counts of felony stealing for taking money from clients' accounts. Cathy Luethen must return the full $50,000.
- Dent County funeral home director Jane Spencer Turner pleaded guilty and was sentenced to four years in prison for multiple counts of failing to pay state taxes.
- Darrell Turner was convicted of first-degree assault, burglary, armed criminal action and unlawful use of a weapon in the gang-style shooting of a potential witness in Camden County. The victim survived. Turner was sentenced to life plus 137 years.
- Former Randolph County Commissioner Chuck Bankhead pleaded guilty to stealing from the Higbee Community Betterment and Cub Scouts. He had to resign as commissioner.

Terrorist threats allow warrantless searches

After 9/11, law enforcement and the courts recognized that public safety concerns justify certain warrantless searches to protect against threats of terrorism.

Searches that may have been considered improper years ago are now considered constitutional if narrowly tailored to increase safety and security.

The Fourth Amendment to the U.S. Constitution prohibits unreasonable searches and seizures. What might have been considered unreasonable 10 years ago now seems reasonable following 9/11.

The "Special Needs Doctrine" allows for certain types of suspicionless searches or seizures when the purpose is to prevent terrorism rather than evidence gathering.

In other words, the types of searches that the Special Needs Doctrine permits are those where the officers are not trying to gather evidence to solve or uncover criminal activity, but where the primary goal is to protect individuals from attack.

In *MacWade v. Kelly*, the federal appellate court in New York upheld the program of conducting warrantless searches of subway passengers. The warrantless search of airline passengers has been recognized as necessary and lawful for many years.

Check with prosecutor before conducting searches

Agencies should discuss any plans to conduct warrantless searches with their county prosecutors and legal advisers before implementing them.

In *Cassidy v. Chertoff*, decided by the Second Circuit, the courts upheld the suspicionless search of all passengers using a ferry. There are two significant issues discussed by the court:

- First, the special-needs exception allows for suspicionless searches even if there might be alternative methods to provide for safety. The plaintiffs argued that the government could use metal detectors rather than searching the passengers' baggage.

  The court held that it did not matter if the searches were the least intrusive means of achieving safety, "but whether the means they chose unconstitutionally trenched on plaintiffs' privacy interests in an unreasonable way."
- Second, the ferry crossed Lake Champlain in northern New York state. The plaintiffs argued that the risk of a terrorist attack on that ferry was far less likely than in New York City.

  The court again noted that airport security measures are permissible no matter how small the airport, and that as long as a plan is reasonably addressing a possible threat, it is unnecessary to limit the plan to high-risk areas.

This type of warrantless search will continue to result in court challenges. Although not an exception to the search warrant requirement that road officers will use very often, it is an exception that may become a useful tool for agencies in increasing safety.

UPDATE: CASE LAW

Opinions can be found at www.findlaw.com/casecode/index.html

MISSOURI EASTERN DISTRICT

POST-CONVICTION RELIEF, EVIDENTIARY HEARING

Teer v. State

No. 86500, Mo.App., E.D., Aug. 22, 2006

Teer appealed the motion court's denial of his post-conviction relief motion without an evidentiary hearing. He had been convicted of four counts of involuntary manslaughter, and one count of second-degree assault while driving under the influence of alcohol. The jury recommended 10 months in jail for each manslaughter count and eight months in jail for assault.

After the jury began deliberating but prior to the verdict, the trial court granted a motion by the state to amend the information to provide that Teer was a prior offender. The trial court found Teer to be a prior offender and sentenced him to four years' imprisonment for each count to be served consecutively.

The first round of post-conviction relief matters resulted in a remand to the circuit court to determine if Teer was entitled to an evidentiary hearing on his post-conviction relief motion.

On remand, the circuit court denied the motion and Teer appealed. The appeals court again remanded the case, this time for an evidentiary hearing.

The court said Teer was entitled to an evidentiary hearing to determine whether his appellate counsel was ineffective for failing to object to the state's filing of the amended information and if he was prejudiced.

POST-CONVICTION RELIEF, FAILURE TO SIGN MOTION

Purham v. State

No. 86733, Mo.App., E.D., Aug. 29, 2006

Purham appealed the circuit court's judgment denying his Rule 24.035 post-conviction relief motion. He entered an Alford plea to assault and armed criminal action charges, which was accepted by the circuit court.

He later filed a Rule 24.035 motion, alleging ineffective counsel, but did not sign this motion.

The appeals court held that since Purham failed to sign his motion, the circuit court lacked jurisdiction to rule on it and the appeals court lacked jurisdiction to consider it.

FIRST-DEGREE MURDER, SENTENCING, RESENTENCING, RE-RESENTENCING

State v. Rowan

No. 87067, Mo.App., E.D., Sept. 12, 2006

Rowan was found guilty of second-degree murder after a jury trial. At sentencing, defense counsel asserted that Rowan would only have to serve 85 percent of his life sentence. The trial court disagreed, contending that there was no 85 percent of life and imposed a life sentence. Rowan appealed.

On the first appeal, the appeals court reversed the sentence and remanded the case for resentencing. The court held that at sentencing, the trial court was mistaken about the amount of time that Rowan would serve in prison before being parole eligible.

At sentencing after remand, Rowan's attorney attempted to introduce evidence of his good behavior in prison while his first appeal was pending. The court refused to consider such evidence, asserted it was irrelevant, and once again sentenced Rowan to life imprisonment. He again appealed.

The appeals court determined that a trial court has discretion in sentencing to consider a variety of factors, and that the U.S. Supreme Court has held that information — including post sentence behavior — may be considered by a court.

The case was remanded a second time for re-resentencing. The appeals court added that the trial court had authority to reimpose the original sentence if it chose to do so.

STATUTORY SODOMY, GUILTY PLEA, PLEA BARGAIN

Eckhoff v. State

No. 86571, Mo.App., E.D., Sept. 12, 2006

Eckhoff pleaded guilty to two counts of first-degree statutory sodomy after the prosecutor informed him and the trial court that the range of punishment was five years to life on first-degree statutory sodomy.

During sentencing, another prosecutor pointed out that the statutory minimum sentence for Eckhoff's first-degree statutory sodomy counts was 10 years' imprisonment because the victim was younger than 12.

This prosecutor said the state was asking the trial court to sentence Eckhoff to 14 years on each count, but would ask that the sentences run concurrently.

Eckhoff's plea counsel requested that he be sentenced to seven years for each count to run concurrently.

The trial court sentenced Eckhoff to two concurrent terms of 14 years and did not ask him if he wanted to withdraw his guilty plea before sentencing. Eckhoff appealed after his PCR motion was denied.

The appeals court held that Eckhoff was entitled to relief, because at sentencing the state breached the plea agreement and Eckhoff was prejudiced by not getting the benefit of the plea bargain.

Eckhoff's pleas were found to be unknowing, unintelligent, and involuntary because he would not have pleaded guilty but for the plea agreement by the state. The case was remanded to the trial court where the defendant could withdraw his guilty plea.

UPDATE: CASE LAW

MISSOURI EASTERN DISTRICT

DRIVER'S LICENSE, REVOCATION FOR REFUSAL TO BE TESTED

Tarlton v. Director of Revenue
No. 87311, Mo.App., E.D., Sept. 19, 2006

The director of revenue appealed a trial court judgment reinstating Tarlton's driving privileges, which were revoked because he refused to submit to a Breathalyzer test when suspected of driving while intoxicated.

The director proved with evidence that Tarlton refused to submit to the Breathalyzer to determine his blood alcohol content, and Tarlton did not present evidence to rebut the director's case.

Accordingly, the trial court erred in finding that Tarlton did not refuse to submit to a Breathalyzer. The director had the authority under section 577.041 to revoke Tarlton's driving privileges for one year for his refusal.

MISSOURI WESTERN DISTRICT

BAIL BONDS, OBLIGATION OF SURETY AFTER SENTENCING BUT BEFORE COMMITMENT

State v. Wilson, Bada Bing Bail Bonds
No. 65435, Mo.App., W.D., Aug. 15, 2006

In a case where a defendant failed to appear to begin serving his sentence and was arrested a year later, the appeals court stated that a surety on a bond is released only when the conditions of the bond have been satisfied, or by depositing cash in the amount of the bond, or by surrendering the defendant to custody of law enforcement.

The court said Bada Bing had a continuing obligation to keep track of the defendant and assure his appearance and compliance with court orders to appear to begin serving his sentence.

AFFIRMATIVE DEFENSES, INVOLUNTARY INTOXICATION, IMPROPER ARGUMENT

State v. Bennett
No. 65414, Mo.App., W.D., Sept. 19, 2006

Bennett appealed his jury convictions for first-degree robbery and armed criminal action. The defense at trial was involuntary intoxication. Bennett's wife testified she had discarded LSD into an empty beer can that Bennett "could possibly" have drunk from before the robbery. She also testified that Bennett "probably" drank four beers before going to the store for more beer.

Bennett argued that the trial court plainly erred in failing to intervene, *sua sponte*, during the prosecutor's closing arguments. He contended the prosecutor misled the jury by creating the impression that the state only had to prove that the defendant took money while armed in order to convict him on both counts.

Bennett also argued the prosecutor misstated the elements of each offense by omitting the requirement that the state must prove beyond a reasonable doubt that the defendant was not entitled to an acquittal by reason of involuntary intoxication. He also asserted the prosecutor incorrectly argued that the state did not have to prove a negative and improperly suggested that Bennett had the burden of proving, not merely injecting, his defense of involuntary intoxication.

The appeals court disagreed that the jury was misled by the prosecutor's arguments. Rather than attempting to fully explain the state's burden, the prosecutor was merely responding to statements made during defense counsel's closing argument. Thus, the prosecutor addressed those factual aspects of the case that the defense claimed had not been proven.

CONFRONTATION CLAUSE, RIGHT TO CROSS-EXAMINE CHILD VICTIM, SECTION 491.680 TESTIMONY BY VIDEOTAPED DEPOSITION

State v. Griffin
No. 63968, Mo.App., W.D., Aug. 22, 2006

Griffin claimed he was denied his constitutional right to confront and cross-examine the witnesses against him because the trial court admitted hearsay statements of the victim, who was 5.

Before trial, the state filed a motion to permit the victim to testify by videotaped deposition and to exclude the defendant from the deposition proceedings. The trial court found that significant emotional or psychological trauma would result to the child and granted both motions.

At trial, over Griffin's objection, the court permitted the state to introduce the girl's videotaped testimony. The state filed a motion to introduce statements about Griffin's sexual abuse that the victim made to other witnesses and the videotaped forensic interview.

The appeals court held that since Griffin had the right to cross-examine the victim during her videotaped deposition, he was not denied his constitutional right to confront and cross-examine the witnesses against him by the admission of the victim's prior hearsay statements.

Griffin claimed the admission of the victim's hearsay statements violated the constitutional requirements established by *Crawford v. Washington*.

The appeals court found it was unnecessary to determine whether the statements admitted at trial were testimonial because Griffin had a prior opportunity to cross-examine the victim.

Since the trial court found that the victim was an unavailable witness and Griffin had a sufficient opportunity to cross-examine her before trial, the requirements of *Crawford* were met.

ID Theft Hotline
800-392-8222

Nixon has set up a hotline to help Missourians recognize and report identity theft. He also now has a complaint form online at **ago.mo.gov** for victims to report theft.

UPDATE: CASE LAW

MISSOURI WESTERN DISTRICT

INTERSTATE AGREEMENT ON DETAINERS ACT, AGREEMENTS BETWEEN GOVERNORS ON EXTRADITION, ACCOMPLICE LIABILITY JURY INSTRUCTIONS

State v. Davis

No. 64993, Mo.App., W.D., Sept. 12, 2006

Davis and an accomplice traveled from Omaha to Kansas City and murdered Charles and Glendora Taylor in 1997. Davis was found guilty by a Jackson County jury and sentenced to life imprisonment without parole on each of two murder counts and life imprisonment on each of two counts of armed criminal action.

Davis appealed, claiming his case should have been dismissed pursuant to the provisions of the Interstate Agreement on Detainers Act. The appeals court found that under the IAD, there are two ways in which the defendant may be delivered into the custody of the state lodging the detainer for disposition of the charges against him.

Article III of the IAD provides that the defendant may request, in writing, disposition of the charges. Davis never requested disposition of his charges and so the provisions of Article III were not applicable.

The appeals court also found there was no manifest injustice or miscarriage of justice from an erroneously submitted instruction to the jury. Davis had argued that the judge erred in submitting verdict-directing instructions for first-degree murder that failed to comply with MAI-CR 3d 304.04 (accomplice liability) by failing to require a finding that Davis personally had deliberated on the murders.

The facts left no doubt that the shootings occurred after cool reflection on the matter for at least a brief time. Nothing in the record indicates that any of the assailants participated in the murders without deliberating.

PAROLE ELIGIBILITY, CALCULATING MINIMUM PRISON SENTENCES

Wolfe v. Missouri Department of Corrections

No. 65886, Mo.App., W.D., Aug. 29, 2006

The Department of Corrections appealed a circuit court decision determining the minimum sentence Wolfe must serve under section 558.019.

Wolfe was sentenced to life in prison for second-degree murder and a consecutive sentence of 10 years for first-degree robbery.

The department calculated that Wolfe first would be eligible for parole at age 70 in 2053. The department applied the "age 70 rule" for sentences that equal or exceed 75 years because Wolfe had been sentenced to a life sentence and a consecutive 10-year sentence.

Wolfe argued that the minimum term he must serve prior to his first parole is 34 years — 85 percent of 30 years for his life sentence, plus 85 percent of 10 years for his consecutive sentence.

Using section 558.019.4(1), the circuit court determined that Wolfe's aggregate sentence was 40 years — 30 years (life) plus 10 — and that he was required under section 558.019.3 to serve 85 percent of his sentences, which would be 34 years. The state's sole point on appeal was that the circuit court erred in its application of section 558.019, but the appeals court upheld the decision.

MISSOURI SOUTHERN DISTRICT

FIRST-DEGREE ASSAULT, ADMISSIBILITY OF STATEMENTS

State v. Brede

No. 27182, Mo.App., S.D., Aug. 21, 2006

Brede, who was convicted of assault, armed criminal action and unlawful use of a weapon, argued that the trial judge erroneously allowed evidence of meth-related activity through a videotaped statement and that it would have been simple to redact the tape to omit the references to drug activity.

The appeals court found the videotaped admissions were probative of a possible motive for the shooting and the intent to carry out the assault and probative of a showing of an absence of mistake or accident when he shot the victim.

SECOND-DEGREE MURDER, ACCOMPLICE LIABILITY, ALTERNATIVE SUBMISSIONS

State v. Reese

No. 27100, Mo.App., S.D., Aug. 21, 2006

The jury that convicted Reese of second-degree murder was instructed on a theory of accomplice liability using MAI-CR 304.04.

The only issue on appeal was if the trial court erred in giving an instruction that was broader in scope than the evidence presented and had the potential for misleading and confusing the jury because there was no evidence the defendant acted together with or aided another person.

In deciding the case, the appeals court recited the law that the basic principle applicable to the submission of instructions is that they should not be given if there is no evidence to support them.

Instructions must be supported by substantial evidence and reasonable inferences to be drawn there from. A court can instruct a jury on alternative theories if each is supported by evidence.

UPDATE: CASE LAW

MISSOURI SOUTHERN DISTRICT

POST-CONVICTION RELIEF, INEFFECTIVE ASSISTANCE, EVIDENTIARY HEARING

Taylor v. State

No. 27501, Mo.App., S.D., Aug. 18, 2006

Taylor filed a motion for post-conviction relief claiming ineffective assistance of counsel after being convicted of robbery and armed criminal action. The circuit court denied the motion without an evidentiary hearing.

The appeals court gave deference to the decision by Taylor's attorney regarding the use of the witnesses and the effect that the witness, if any, would have had on the interest of his client.

Trial counsel's mere failure to impeach a witness does not entitle a movant to post-conviction relief. To be entitled to relief, impeachment would have to have provided movant with a defense or would have to have changed the trial outcome. Taylor also complained that his trial attorney failed to call movant's mother as an alibi witness.

The appeals court determined that the lower court erred in denying Taylor's motion on this point without an evidentiary hearing and remanded the case for an evidentiary hearing on the issue of the failure to call Taylor's mother as an alibi witness.

SECOND-DEGREE BURGLARY, ADMISSIBILITY OF EVIDENCE

State v. Boydston

No. 27210, Mo.App., S.D., Aug. 23, 2006

Convicted of burglary, Boydston appealed the admissibility of a crowbar purportedly used and found at the crime scene. He argued the state failed to prove "Exhibit 11" was the same crowbar a witness saw the burglar carrying in the bar that night or that it was in the same condition as at the time of the burglary.

The crowbar was admitted as evidence over objection. In the motion for a new trial, the objection was because "the foundation testimony did not provide reasonable assurances that the item was the item it purports to be, nor did it provide reasonable assurances that the item had not been tampered with or substituted."

The appeals court found that without a specific objection calling the attention of the trial court to the particular grounds or reason for the objection, Boydston's foundational argument was not preserved for appellate review.

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FORCIBLE SODOMY, ADMISSIBILITY OF EVIDENCE

State v. Johnson

No. 27168, Mo.App., S.D., Sept. 13, 2006

On appeal of his sodomy conviction, Johnson did not contest the sufficiency of the evidence supporting his conviction, but contended the trial court erred in allowing into evidence a packaged condom found in his closet.

The only issue raised on appeal was that the trial court abused its discretion in allowing into evidence the condom, because it was evidence of other bad acts and was not probative evidence concerning the charged offense.

Johnson argued that evidence of one condom found in his closet was, if at all, of only marginal logical relevance, and not legally relevant, as it was extremely prejudicial and inflammatory.

He further stated that there are no allegations he used a condom during the incident, so its presence did not tend to prove a matter in issue.

The condom was not offered to show the defendant's propensity to commit forcible sodomy; rather its admission was "necessary to provide a complete and coherent picture of the crime charged ... [and] the circumstances surrounding it." Therefore it is admissible under the res gestae exception.

The fact that Johnson had a condom, which he did not intend to use for intercourse with his wife, near items he had taken from the victim's bedroom was part of the complete picture of the crime.

STATUTORY SODOMY AND RAPE

State v. Michael David Fewell

No. 26949, Mo.App., S.D., Aug. 30, 2006

Fewell was charged with first-degree statutory rape and first-degree statutory sodomy of his 12-year-old stepdaughter. A jury convicted him on the rape charge and a lesser offense of first-degree child molestation.

On appeal Fewell contended that the judge should not have given the jury an MAI-CR3d 320.03 instruction on sodomy and an instruction for a lesser included offense of first-degree child molestation.

The appeals court found there was ample affirmative evidence for the jury to find Fewell touched the victim's genital area with his hand but did not penetrate her vagina with his fingers. Consequently, no error was committed, plain or otherwise, when the trial court instructed the jury on the lesser included offense of first-degree child molestation in connection with the count II offense.

The appeals court also rejected Fewell's argument that the trial court improperly allowed a doctor who examined the victim after the sexual abuse to comment on the victim's credibility.

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Case clears way for unrelated questions during stops

A Jan. 19 decision by the 10th U.S. Circuit Court of Appeals clears the way for law enforcement officers to ask questions unrelated to the purpose of a traffic stop if the questioning does **not** prolong the stop. Otherwise, the detention will be deemed unlawful.

U.S. v. Stewart
No. 05-4255
Jan. 19, 2007
10th Circuit

There is no dispute that what may start as a routine traffic stop can often result in the detection of more serious crimes through good investigative police work. Yet the judicial philosophy has persisted that officers violate a driver's constitutional rights if the officer asks unrelated questions.

In *U.S. v. Stewart*, the 10th Circuit overturned an earlier limitation it had placed on police questioning and held that "the content of police questions during a lawful detention does not implicate the Fourth Amendment as long as those questions do not prolong the detention."

Unrelated questioning allowed

The AG's Office believes the law now clearly establishes that officers may ask questions unrelated to the purpose of a traffic stop if the questioning does not extend the stop. For example, a five-minute traffic stop cannot become a six-minute stop from questioning that is unrelated to the stop. Otherwise, the detention will be deemed unlawful and evidence or statements obtained will be excluded.

The officer stopped Stewart for driving with improper license plates and asked a common question: "Do you have any weapons or contraband in your vehicle?" Stewart said he had a pistol under his seat, which was a loaded 9 mm handgun.

Although decisions by the 10th Circuit are not binding on Missouri courts, the decision is important: The court relied on two 2005 U.S. Supreme Court decisions when it concluded that questioning on any topic is permissible — as long as it does not extend the detention of the driver.

- In *Illinois v. Caballes*, 125 S.Ct. 834, the Supreme Court held that it was not unconstitutional for a drug dog to be used to sniff for possible drugs during a routine traffic stop if it did not extend the length of the stop. If using a drug dog is not considered overly intrusive, then questions about drugs or contraband cannot be unconstitutional.
- More to the point was the Supreme Court's decision in *Muehler v. Mena*, 125 S.Ct. 1465. The Supreme Court found nothing improper about an officer asking an individual about her immigrant status during the execution of a search warrant. The court stated that it has "held repeatedly that mere police questioning does not constitute a seizure" and "Even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual." This includes asking for consent to search.